United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Original

To Be Argued By
James W. Lamberton

76-7095

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7095

TRIEBWASSER & KATZ, a partnership consisting of JONAH TRIEBWASSER and WILLIAM KATZ,

Plaintiff-Appellee,

-against-

AMERICAN TELEPHONE & TELEGRAPH COMPANY, NEW YORK TELEPHONE COMPANY and REUBEN H. DONNELLEY CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

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INTRODUCTORY STATEMENT

Plaintiff-appellee's brief fails to come to grips with the basic factual and legal issues raised by the defendants-appellants on this appeal, including the issues of the existence of an actionable conspiracy, the reasonableness of the alleged restraint and its effect upon interstate commerce. Apart from its mischaracterizations of the evidence* and its unsupported

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* E.g., "[t]hat N.Y. Telco and the other 22 operating subsidiaries of AT&T are not in the debugging business is simply ludicrous." (Plaintiff's Brief, p. 8). It is difficult to understand how a non-revenue-producing activity carried on at exceedingly modest levels as an incident of repair service (Defendant's Brief, pp. 11-14) can rise to the status of a "business."

assertions,* plaintiff simply asserts that the court below did not abuse its discretion and applied the proper standard in granting plaintiff injunctive relief. If anything, plaintiff's decision to ignore "a range of [defendants'] arguments which are burdened with a plethora of citations" (Plaintiff's Brief, p. 19) provides further support for defendants' contention that it was improper for the court below to issue a preliminary injunction on the basis of the meager evidence before it.

Accordingly, we will not reiterate the factual and legal arguments advanced in our initial brief to which plaintiff has not addressed itself.**

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* E.g., the court below did not find that the plaintiff's "ability to economically compete in a field of wholly legitimate enterprise is substantially foreclosed" (Plaintiff's Brief, p. 22) by N.Y. Telco's advertising policy.

** We would, however, like to bring to the Court's attention a recent development bearing on statements made in both our brief and that of the appellee to the effect that the New York Public Service Commission does not regulate Yellow Pages directory advertising (compare Defendants' Brief, p. 6 with Plaintiff's Brief, p. 5). On April 6, 1976, the Commission issued an order to N.Y. Telco to show cause in a case involving an increase in the maximum page size of advertising in the Yellow Pages for Nassau and Suffolk Counties. New York Public Service Commission, Case No. 26,991. As of the time of the filing of this brief, N.Y. Telco has not filed a response with the Commission.

ARGUMENT

PLAINTIFF-APPELLEE RAISES NO SUFFICIENT ARGUMENT FOR THE AFFIRMANCE OF THE GRANTING OF THE PRELIMINARY INJUNCTION

A. The scope of review.

Plaintiff's invocation of the lower court's "discretion" does not end the inquiry of the appellate court. As this Court noted in Carroll v. American Federation of Musicians, 295 F.2d 484, 488-89 (2d Cir. 1961):

> "In holding that a temporary injunction should have issued to the extent indicated, we are not unmindful that, as Judge Sanborn stated a half century ago, it is 'to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?' Love v. Atchison, T.& S.F. Ry., 8 Cir., 1911, 185 F. 321, 331. However, that does not mean that denial of a temporary injunction is to be free from review. Congress would scarcely have gone to the pains of amending the Evarts Act, 26 Stat. 826, 828 (1891), which had provided interlocutory review over the grant or continuance of injunctions as an exception to the general requirement of finality, so as also to include their denial, 28 Stat. 666 (1895), and then of repeating the process when it enacted § 129 of the Judicial Code of 1911, 36 Stat. 1134, modifying 31 Stat. 660, (1900) in this respect, unless it had thought that meaningful duties were being imposed upon the Courts of Appeals. Moreover, as said by Chief Judge Magruder, '"Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors,' In re Josephson, 1 Cir., 1954, 218 F.2d 174, 182; see, to much the same effect, Judge Learned Hand in Barnett v. Equitable Trust Co., 2 Cir., 1929, 34 F.2d 916, 920." [Footnote omitted.]

B. The proper standards for the issuance of a preliminary injunction.

Plaintiff argues that the court below did not err in applying the second prong of the test for the issuance of preliminary injunctions announced in Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). Plaintiff's Brief, pp. 14-18. Three independent bases for the requirement of a higher standard are set forth in Defendants' Brief (pp. 16-19).

First, independent of the Sonesta test, there is the Clayton Act's requirement of "a showing that the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26. Despite the explicit statutory language setting forth immediate irreparable injury as an independent test for preliminary injunctive relief, plaintiff argues that courts have, in other antitrust cases, purported to apply the Sonesta test alone.

The two cases cited by plaintiff do not support plaintiff's argument. In Columbia Pictures Industries, Inc. v. American Broadcasting Co., Inc., 501 F.2d 894 (2d Cir. 1974), the court affirmed the denial of a preliminary injunction and in Supermarket Services, Inc. v. Hartz Mountain Corp., 382 F. Supp. 1248 (S.D.N.Y. 1974), the court granted a preliminary injunction based on a finding of irreparable injury. Thus, neither court reached the issue of whether immediate irreparable injury must be shown as an independent

requirement in antitrust cases. Since those cases were decided, this Court was reiterated the independent statutory requirement of immediate and irreparable injury. SCM Corp. v. Xerox Corp., 507 F.2d 358 (2d Cir. 1974).*

In the alternative, plaintiff apparently argues that the showing of immediate irreparable injury required by statute is equivalent to the finding of the court below that the balance of hardship tips decidedly toward plaintiff. Plaintiff's Brief at pp. 18-19. While the elements of such a balancing may be relevant to a finding of irreparable injury, those tests are not the same. A finding of immediate irreparable injury demands an inquiry not engaged in by the court below in its balancing of hardships.

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* An even more recent decision recognizing that a finding of irreparable injury is a statutorily mandated prerequisite to the issuance of a preliminary injunction is Media Networks, Inc. v. American Tel. & Tel. Co., 1976-1 CCH Trade Cases ¶ 60,780 (D. Minn. 1976) (noted at Defendants' Brief, p. 28). It appears to be the rule in each of the other Circuit Courts that irreparable injury must be shown to obtain a preliminary injunction in an antitrust case. Automatic Radio Mfg. Co. v. Ford Motor Co., 272 F. Supp. 744 (D. Mass. 1967), aff'd, 390 F.2d 113 (1st Cir.), cert. denied, 391 U.S. 914 (1968); Penn Galvanizing Co. v. Lukens Steel Co., 468 F.2d 1021 (3d Cir. 1972); Virginia Airmotive, Ltd. v. Conair Corp., 393 F.2d 126 (4th Cir. 1968); Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir.), cert. denied, 419 U.S. 1050 (1974); Garlock, Inc. v. United Seal Inc., 404 F.2d 256 (6th Cir. 1968); Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971); Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973); Foremost International Tours, Inc. v. Qantas Airways Ltd., 525 F.2d 281 (9th Cir. 1975); U.S. Electric Supply Co. v. Maurice Electrical Supply Co., 1975-2 CCH Trade Cases ¶ 60,587 (D.D.C. 1975).

Columbia Picture Industries, Inc. v. American Broadcasting Co., Inc., supra, relied upon by plaintiff demonstrates that the irreparable injury requirement is a different -- and, to some extent, a more burdensome (see Broder v. Dane, 384 F. Supp. 1312, 1317 (S.D.N.Y. 1974)) -- test than that involved in balancing the hardships. See 501 F.2d at 898. See also IIT v. Vencap, Ltd., 519 F.2d 1001, 1019 n.33 (2d Cir. 1975), a case finding a balance of hardship tipping decidely in favor of plaintiffs while refusing to find irreparable injury.

The second basis for requiring a higher standard for the issuance of a preliminary injunction in the instant case is that such a standard is necessary where the preliminary injunction grants plaintiff the ultimate relief it seeks. Plaintiff does not address itself to this argument.

Third, where the relief granted is mandatory in effect, a higher standard must be met. Plaintiff seems at a loss to understand the mandatory effect of an injunction prohibitory in form. Plaintiff's Brief, p. 11. The answer is that the court below has required N.Y. Telco to include plaintiff's debugging advertisement or to forego the publication of its Yellow Pages directory. As stated in Developments in the Law - Injunctions, 78 Harv. L. Rev. 994, 1062 (1965), "The 'mandatory' injunction has not yet been devised that

could not be stated in 'prohibitory' terms." In such circumstances, as the cases cited in Defendants' Brief at pp. 18-19 indicate, plaintiff must undertake a heavier burden of proof than in the usual case.

C. The application of those standards to the instant case.

As noted above, plaintiff, instead of meeting the issues raised in Defendants' Brief, refers only to the opinion of the court below. We will thus not attempt to restate the issues raised in our earlier brief but rather will note a recent decision indicating a movement away from the literalism of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

In International Railways v. United Brands Co., 1976-1 CCH Trade Cases ¶ 60,764 (2d Cir. 1976), this Court declined after a trial on the merits "to become enmeshed in this thicket" of the intra-enterprise conspiracy doctrine. Id. at 68,303. In doing so, the Court refused to apply a per se rule in the refusal-to-deal context where a conspiracy was alleged between a corporation and its wholly-owned subsidiary.* Given the extreme doubtfulness of the applicability of the intra-enterprise conspiracy doctrine to the

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* Similarly, in United States v. Citizens and Southern National Bank, 422 U.S. 86 (1975), the Supreme Court, with a formal nod to the Perma Life Mufflers doctrine (id. at 116-117), applied the rule of reason to hold that "intimate and continuous cooperation and consultation as to almost every facet of doing business" (id. at 113) among affiliated corporations did not constitute a violation of Section 1 of the Sherman Act. See also Sulmeyer v. Seven-Up Co., 1976-1 CCH Trade Cases ¶ 60,799 (S.D.N.Y. 1976); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975).

instant case, we believe it was error for the court below to enter this "thicket," particularly before a full trial on the merits.

CONCLUSION

For the reasons set forth above and in our initial brief, we respectfully request that the order of the District Court, entered on February 25, 1976, and modified on February 26, 1976, granting plaintiff's motion for a preliminary injunction, be reversed.

Dated: New York, New York
April 21, 1976

Respectfully submitted,

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